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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 208

NATIONAL MINERAL COMPANY,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FLOYD L. LANHAM,
105 W. Adams St.,
Chicago, Illinois,
Attorney for Petitioner.

Of Counsel:
ADOLPH ALLEN RUBINSON

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INDEX

AUTHORITIES CITED.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

National Mineral Company, petitioner, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review in the interests of justice and the sound development of the law of labor relations, a decree of enforcement entered by that court April 30, 1943, in an original proceeding by the National Labor Relations Board against National Mineral Company under Sections 9 (d) and 10(e) of the National Labor Relations Act, 49 Stat. 449, seeking to compel compliance with the Board's order upon National Mineral Company to bargain collectively with a certain union, and to do certain acts and refrain from doing others.

A transcript of the record before the Board, and of the proceedings before the Circuit Court of Appeals is trans-

mitted herewith.[1] Included therein is the opinion of the Circuit Court of Appeals (R.A. 116), which is reported in 134 Fed. (2) 424 as *National Labor Relations Board* v. *National Mineral Company.*

SUMMARY AND SHORT STATEMENT.

The matter involved here is the validity of proceedings under Section 9(c) of the National Labor Relations Act, and whether in those proceedings and in subsequent unfair practice proceedings based thereon petitioner was accorded the fundamentals of a fair hearing and the correct application of the law.

Petitioner, an Illinois corporation, was engaged from 1937-41 in the manufacture of cosmetics and beauty shop equipment. It had 549 production employees of whom 80 were engaged in making chrome furniture (R.A. 6-8).

In March 1940, Cosmetic Union[2] filed a petition with the Board under Sec. 9 of the Act, 49 Stat. 453, 29 U.S.C.A. 159, and under the Rules of the Board,[3] alleging it (Cosmetic Union) had been designated as bargaining representative by 315 of the Company's alleged 360 production employees, that despite such majority representation the Company had refused to recognize it as the exclusive representative for all production employees, as required by

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[1] The Record is referred to as follows:
B.B.=Brief for the NLRB; B.A.=Appendix to Board's Brief; B. Rep.=Reply Brief of Board and memo in opposition to petition to dismiss case as moot; R.B.=Respondent's Brief; R.A.=Appendix to Respondent's Brief; R. Rep.= Respondent's Petition for Rehearing.

[2] Beautician's Supplies and Cosmetic Worker's Union Local 21107 (A. F. of L.).

[3] Rules and Regulations, Series 2, as Amended. Fed. Reg. July 14, 1939, Jan. 27, 1940 and March 13, 1940. Parts are reprinted herein under "Questions involved."

law[4] thereby creating a question of representation; that no other union claimed to represent any employees; and that the Board should investigate the matter and certify it as the representative which had been selected (R.A. 35).

In April 1940, a different union, Furniture Union,[5] without notice to the Company filed with the Board a so-called "amended petition" alleging that it had been designated as represenative by 315 of an alleged 360 production employees, and requested certification as the sole bargaining agent. It purported to execute the petition as a "successor" to Cosmetic Union, but no documents of succession were attached to the petition or alleged therein (R.A. 34).

A hearing was fixed on the petition, of which notice was given to the Company. To establish the allegation that it had been designated as bargaining representative by a majority of the employees, Furniture Union introduced cards purportedly signed by employees, but all designating Cosmetic Union as the bargaining representative (R.A. 36). Not a single power of attorney or designation ran to Furniture Union.

Upon the Company's attempt to introduce evidence (1) that the cards were forged or obtained by fraud; (2) that no valid successorship was effected; (3) that Furniture Union by its own charter had no authority to repre-

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[4] The Act states that "Representatives designated or selected . . . by the majority of the employees . . . shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining (Sec. 9(a)).

Employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . (Sec. 7).

It shall be an unfair labor practice for an employer—(1) to interfere with . . . employees in the exercise of rights guaranteed in Sec. 7 (Sec. 8(1)).

[5] Chrome Furniture Handlers and Misc. Crafts Union, Local 656 of Upholsterer's Int. Union (A. F. of L.).

sent Cosmetic Workers; (4) that only 80 of the 549 production employees were within the employee jurisdiction of Furniture Union; (5) that Cosmetic Union did not dissolve and was still in existence at the time of the Furniture Union petition; (6) that Furniture Union did not desire to represent employees outside its jurisdiction (R.B. 4, 5), the Board ruled that the only issues that could be considered under the applicable law were (1) whether there is a question of representation; (2) the appropriate bargaining unit, and (3) the appropriate payroll date (R.A. 27, 3), and stated the foregoing issues were immaterial. It was disclosed by offers of proof or otherwise, however, that the foregoing contentions were true (R.B. 4, 5). The Board on July 2, 1940 held as a matter of law, despite the foregoing facts and offers of proof of such facts, that there was a "question . . . . concerning representation" within the meaning of Sec. 9(c) of the Act, and ordered an election (B.A. 177). One of the matters involved here is whether such determination is reviewable and the scope and method of review.

An election was held July 23, 1940 over objection by the Company. 83 of the 549 production employees voted, 71 voting for Furniture Union, the only union upon the ballot (B.A. 183). When the Company applied to the District Court to enjoin the election or the publication of the results thereof until the questions raised in the case had been determined, the Board moved to dismiss on the ground that the Act provided for a full, adequate and complete review in unfair practice proceedings based on the election if any were had (R.A. 94). One of the matters involved here is whether such adequate review is in fact available under the law, and whether it was accorded here.

The Board certified Furniture Union as the sole bargaining agent for all 549 production employees on the

basis of the foregoing election at which 83 employees voted (B.A. 184). The Company continued to reserve its objections (R.A. 100, 104).

In February 1941, Furniture Union filed a fourth amended charge alleging that the Company had refused to bargain with it as sole representative of all production employees and other unpair practices (B.A. 149). The Board issued a complaint thereon (B.A. 144).

The answer of the Company denied the unfair practices and raised again the issues of forgery, successorship etc., but the Board ruled that these were irrelevant because already decided by the previous hearing (B.A. 151), although in that hearing also it was ruled that the issues were irrelevant. One of the matters involved here is whether such procedure achieves the minimal of rudiments of fairness necessary to a fair hearing. The Company's objections were preserved by offers of proof over strenuous opposition (R.A. 27, 81, 82). Other unfair proceedings occurred at this hearing such as the change of trial examiners after the Board's case was closed, and a complete reversal by the second trial examiner, during the Company's case, of the rulings made by the first trial examiner during the Board's case on issues raised by the Company (R.A. 56 ff). The Board also refused to grant a subpoena for the production of the cards submitted by Furniture Union at the previous hearing to enable the Company to prove they were forged. The cards were never permitted to be examined by the Company (R.A. 88, 97).

The Board found the Company had refused to bargain with Furniture Union contrary to the Act, found it guilty of the other unfair practices alleged and made the order dated February 28, 1942 which it seeks to sustain here.

In November 1942, the Board applied to the Circuit Court of Appeals for the Seventh Circuit for the enforcement of its order under Sec. 10(e) of the Act, and the Company again raised the issues as to the invalidity of the investigation proceedings under Sec. 9(c) and the lack of a fair hearing in both the investigation case and the unfair practice case based thereon. The Company also filed a petition to dismiss the case as moot, which was denied (R.A. 108). The Company also prayed in the alternative that the case be returned to the Board with orders to adduce additional evidence, or for other relief (R.B. 30). All these prayers were denied, and a decree of enforcement entered. A petition for rehearing was also denied (R.A. 135).

Petitioner seeks to review the decree by certiorari.

BASIS FOR JURISDICTION TO REVIEW.

The decree of enforcement was entered by the Circuit Court of Appeals on April 30, 1943. This Court is given jurisdiction to review that decree by Sections 9(d) and 10(e) of the National Labor Relations Act, 49 Stat. 449, Act of July 5, 1935, 29 U. S. C. Supp. V, Sec. 151 *et seq.*, and by the Constitution of the United States, Art. III, Secs. 1, 2 and 3.

QUESTIONS PRESENTED.

I.

As part of the statutory program to control labor relations, Congress, by the National Labor Relations Act, has authorized the Labor Board in limited instances to ascertain by election or otherwise whether a majority of the employees of an appropriate unit have or have not desig-

nated a representative to bargain for them collectively,[1, 2] and has attached serious consequences to such determination for employees and employers alike.[2]

A. What is the extent of the Board's authority to direct an election; what showing must be made to the Board to justify its exercise, and what if any substantive or procedural limitations exist upon its exercise under the statute,[1] the rules of the Board made pursuant to the statute,[3] and the Constitution.

1. When is there a "question" "concerning representation" within the meaning of Section 9(c)[1]. Does

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[1] **National Labor Relations Act, 49 Stat. 453, c. 372, ¶ 9, 29 U. S. S. A. 159 (underscoring added):**

Sec. 9. (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

[2] Sec. 9. (a) *Representatives designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

[3] **Rules & Regulations, Series 2 as amended, Fed. Reg. July 14, 1939, Jan. 27, 1940, Mar. 13, 1940:**

ARTICLE III.

PROCEDURE UNDER SECTION 9 (c) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES.

this not require a substantial, actual "question"? Is it a jurisdictional fact? Does it appear from the record?

2. Can the Board act without an application to it under the controlling law? What facts must the applicant allege and prove under controlling law?

3. Can the Board refuse to hear evidence that membership cards submitted to it are forged or fraudulent?

B. Has the Board exceeded its authority to direct an election and the limitations upon it in this case?

SECTION 1. A petition requesting the Board to investigate and certify under Section 9 (c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. . . .

SEC. 2. (*a*) Such petition, when filed by an employee or any person or labor organization acting on behalf of employees, shall contain the following:

(1) The name and address of the petitioner.

(2) The name and address of the employer or employers involved, the general nature of their businesses, and the approximate number of their employees.

(3) A description of the bargaining unit which petitioner claims is appropriate and the approximate number of employees in such unit.

(4) The number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining.

(5) The names of any other known individuals or labor organizations which claim to represent any of the employees in the alleged bargaining unit.

(6) A brief statement setting forth the nature of the question that has arisen concerning representation.

(7) Any other relevant facts.

Also Secs. 3, 5, 7, 8.

II.

Are the decisions of the Board on the foregoing questions in representation cases reviewable under Sec. 9(d) of the Act?[4] What is the scope of that review? Is the review provided by the Act adequate and constitutional?

III.

Whether the due process clause and other constitutional safeguards prescribe minimal requirements of a fair hearing in proceedings under Sec. 9(c), and whether these were accorded to petitioner by the Board.

IV.

Did the Circuit Court of Appeals correctly interpret the law relating to the foregoing questions?

V.

Under the applicable law can the issue that a case is moot be raised by respondent in an original proceeding for enforcement brought by the Board in the Circuit Court of Appeals, and did the Court correctly rule on that issue in the present case?

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[4] **National Labor Relations Act:**

Sec. 9. . . . (d) Whenever an order of the Board . . . is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed . . . and thereupon the decree of the court . . . shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

VI.

Was petitioner accorded a fair hearing by the Board in the proceedings on charges of unfair practices based in part upon the certification of a union in the investigation proceedings under Sec. 9(c)?

REASONS FOR GRANTING WRIT.

1. Cases under Sec. 9(c) now total some 67% of all cases filed with the Labor Board. They affect an enormous segment of the nation's employers and workers.

The number of cases under Sec. 9 (c) of the Act increased 93% from 1940 to 1941, numbering 2,243 in 1940 and 4,334 in 1941. The number of cases of unfair practice filed with the Board increased only 22% during the same period, namely from 3,934 in 1940 to 4,817 in 1941 (9 L. R. R. 610, 465; N.L.R.B. Report for Fiscal Year 1940-1941). In a memorandum issued by the Board on April 12, 1943, reviewing the previous 6 years' business, it was stated that 67% of all cases during the year immediately preceding the release were cases under Sec. 9(c) and only 33% were unfair practice cases. In 1937 the proportion was reversed—67% were unfair practice cases and 33% cases under Sec. 9 (c). It was also stated that over 10,000 labor organizations won elections during the 6-year period (12 L. R. R. 204).

2. Despite their importance, this Court has not passed upon the questions which arise under Sec. 9, and the law remains almost wholly unsettled.

Only two cases have been brought to this Honorable Court under Sec. 9 of the Act. They have not squarely raised or settled any of the questions which have been

raised in the present case, and have been decided by the Circuit Court of Appeals as a matter of first impression. In *N. L. R. R.* v. *The Falk Corp.* (1940) 308 U. S. 453, this court merely held that no review could be had of an order of the Board directing an election. No issue was made on the question raised here, namely, what review is possible after an election, certification and subsequent proceedings. In *New York Handkerchief Mfg. Co.* v. *N. L. R. B.,* 114 F. (2) 144, Cert. denied 311 U. S. 704, no question was raised by the petition for certiorari as to the powers and limitations of the Board in initiating proceedings under Sec. 9. In view of the growing importance of these proceedings and the numbers of employees involved, the questions should be settled definitively.

3. By reason of the unsettled state of the law relating to Sec. 9 conflicting rulings were made by the Board at its various hearings which had the effect of depriving petitioner of a fair hearing herein.

The confusion thus created spread to the hearings on the unfair practice charges and resulted in an unfair hearing there also. Since similar issues will recur often in the future this Court would be doing justice in the present case and would avoid such uncertainties in future cases by clarifying the relationship between representation proceedings and unfair practice proceedings when they are joined in enforcement proceedings under Sec. 9(d).

4. The decision of the Circuit Court of Appeals is in conflict with the principle applied by this Court to other sections of the Labor Act.

In a recent case this Court held that evidence of illegal acts by a union using the processes of the Board could not lawfully be excluded from consideration by the Board. *N. L. R. B.* v. *Indiana & Michigan Elec. Co.,* ..... U. S. .....;

87 L. Ed. 355. In the present case the Board refused to receive evidence that cards designating Cosmetic Union as bargaining agent were forged or obtained by fraud and violence and denied the contention that the Board should investigate these offers of evidence to prevent its processes from being misused and invoked contrary to good conscience. The Circuit Court did not even pass upon the question of the correctness of this ruling.

5. The Circuit Court of Appeals has failed to decide many of the fundamental questions raised by petitioner below as to the nature of proceedings under Sec. 9(c) and the minimal requirements of due process thereunder. This is contrary to the accepted and usual course of judicial proceedings, and should be corrected.

CONCLUSION.

Wherefore it is submitted that the petition for certiorari should be granted.

July 29, 1943.

Respectfully submitted,

FLOYD L. LANHAM,
Attorney for Petitioner.

Of Counsel
ADOLPH A. RUBINSON.